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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

(**HONORABLE THOMAS J. WHELAN**)

UNITED STATES OF AMERICA, Plaintiff, v. NICOLAS CESAREO, Defendant.	CASE NO. 08CR0201-W DATE: June 16, 2008 TIME: 2:00 p.m. REPLY TO GOVERNMENT'S RESPONSE TO DISMISS INDICTMENT TOGETHER WITH MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Mr. Cesareo's claim of an invalid deportation is simple and supported by statute and case law. The two reasons why Mr. Cesareo's Stipulated Removal cannot be a basis for a criminal conviction are as follows:

(1) **The IJ did not make a determination of knowing, intelligent and voluntary**: The relevant regulation – 8 CFR 1003.25(b) – requires that when an alien *in not represented by counsel*, the Immigration Judge ("IJ") must take an extra step and "must determine" that the alien signed the stipulation knowingly, intelligently,

and voluntarily. This extra step is IN ADDITION to the requirement that the stipulation a statement that it was knowing, intelligent, and voluntary. Case law and the regulations explicitly indicate that the statement in the stipulation, by itself, is not sufficient. Here, there is no determination by the IJ as required by the regulation.

(2) **Knowing, Intelligent, and Voluntary:** Mr. Cesareo did not enter into the stipulation knowingly, intelligently, and voluntarily. The government does not dispute the facts alleged by Mr. Cesareo.

(3) **Voluntary Departure:** Mr. Cesareo was never advised that he was eligible to voluntary departure rather than deportation. The Ninth Circuit Court of Appeals explicitly held that due process rights are violated when the individual was not informed that "he was eligible for fast track voluntary departure in lieu of removal, under 8 U.S.C. 1229c(a). Accordingly, [the defendant] will have met all the requires for a successful collateral attack on his Section 1326 conviction – provided he can show that he could in fact have received voluntary departure under 1229(a) at the time of his removal hearing." *United States v. Ortiz-Lopez*, 385 F.3d 1202, 1203 (9th Cir. 2004) (attached hereto Exhibit H with relevant portions highlighted for the Court's attention). Because Mr. Cesareo can show that he was eligible for voluntary departure, under Ortiz-Lopez, he has met the requirements of collateral attack under section 1326(d).

The government's response does not, and cannot rebut the claims made by Mr. Cesareo. Each of the arguments alleged by the government are without merit and not supported by statute, regulation, or case law.

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REPLY TO GOVERNMENT'S ARGUMENTS

A. The Regulations to Stipulated Removals Was Expanded to Apply to Unrepresented Aliens. Because of this, the Regulation Now Requires an Additional Step – the IJ Must Make a Determination That the Waiver Was Knowingly, Intelligently, and Voluntarily Entered.

The government's response to this argument is limited to 10 lines – see Government Response ("GR") at 6:24-28 - 7:1-6.[1] In this response, the government does not dispute that the IJ's Order makes no independent finding as to whether Mr. Cesareo entered the stipulation knowingly, intelligently, and voluntarily, but asks this Court to ignore that fact, and to solely rely on the statement within the stipulation signed by Mr. Cesareo. GR at 3:1-6. There are two major problems with the government's argument. The plain language of the regulation requires a determination by the IJ to be made in addition to the signed statement by the alien. And both the administrative and judicial courts have found that this IJ determination must be in addition to the signed statement.

Prior to the regulation change, there was no requirement that the IJ make a determination as to whether the waiver was intelligent, knowing, and voluntary. _See_ 60 FR 26351 (1995) (amending the prior 8 CFR 3.25) (attached hereto for reference as Exhibit J). The reason why such additional step was not previously required was because a stipulated removal was only valid if the alien was represented and advised by counsel. *Id.* Specifically, the regulation required that an attorney file a Notice of Appearance and sign within the stipulated removal that the attorney "explained the consequences of the stipulation" and the alien enters into "the stipulation voluntarily, knowingly, and intelligently.") *Id.* In the amendments made to the regulations in 1995, it was noted that the rule was amended to emphasize "the requirement that only represented respondents/applicants may enter into stipulation requests." *Id.* at 3.

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[1]The government's response does discuss at length that stipulated removals are authorized by Congress and discusses the waivers made in Mr. Cesareo's stipulation. GR 3-6. None of that is relevant to Mr. Cesareo's motion. The issue here is not whether stipulated removals are authorized by Congress. The issue here is whether this stipulated removal complied with the regulations. It did not.

The only case cited by the government on this issue is *United States v. Ramnath*, 958 F.Supp. 99, 101 (E.D. N.Y 1997). Although *Ramnath* does not support the government's argument, it illustrates the distinction between a counseled and an uncounseled stipulation. The issue in *Ramnath* was whether a criminal defendant is entitled to a guideline departure at sentencing based on his stipulation of removal pursuant to a plea agreement. The plea agreement, which included the stipulated removal – like many of the plea agreements in this district – was signed by the defendant upon advise and consultation of counsel and accepted following a Rule 11 colloquy. Because the plea agreement contains a signature by the attorney that the client was advised of the consequences and believes that the agreement was signed knowingly, intelligently, and voluntarily, it would make more sense that the IJ need not make a separate factual finding regarding the waiver.

In 1997, the regulations were changed to allow unrepresented aliens to sign the stipulation of removal. *See* 8 C.F.R. 103.25(b) (attached hereto as Exhibit I) and 62 F.R. 10334 (March 6, 1997). Because the regulation now allowed for the stipulations to be entered into by unrepresented respondents, it now requires the additional step. IJ's must make a factual determination as to the validity of the waiver. The government fails to address the cases cited in Mr. Cesareo's motion which discuss the relevant issue and hold that uncounseled stipulated removals without a factual finding by the IJ regarding the waiver are invalid.

See In re Medrano-Umanzor, 2006 WL 3088805 (BIA 2006) (per curiam) (Exhibit D).	BIA remanded matter "in order to allow the IJ to make the requisite factual finding, in accordance with 8 C.F.R. 103.25(b)." The administrative court held that although the alien signed the stipulation pursuant to the regulation (i.e. contained the statement it was entered into knowingly, intelligently, and voluntarily), the IJ's "decision does not address [the] regulatory requirement." *Id.*

See In re Lagunes-Huerta, 2005 WL 3709274 (BIA 2005) (per curiam) (Exhibit D)	Holding the IJ Order "does not address this regulatory requirement, and will therefore remand the case to the Immigration Judge for further consideration and necessary fact finding."
But See In re Young, 2006 WL 3485805 (BIA 2006) (per curiam) (Exhibit D)	Affirming the validity of the stipulation because "[a]t the bottom of the stipulated removal document, the Immigration Judge indicated that the written stipulations were signed by the parties in the Immigration Judge's presence and that the respondent's waiver of appeal was determined to be voluntary, knowing, and intelligent. We find that this signed typed statement by the Immigration Judge satisfies the requirements of 8 C.F.R. 1003.25(b)."
United States v. Vasquez-Villegas, 2006 WL 2546714 (E.D. Wash. Sept. 1, 2006) (unpublished)	Dismissing the indictment following the defendant's motion to dismiss and the government's non-objection. The government conceded there was no evidence that the "IJ engaged in any fact-finding efforts to determine the validity of Defendant's waiver and that therefore the proceedings were defective" pursuant to the regulations.

It appears that this issue may not have come up frequently before the courts because it may be that most IJ Orders comply with the regulation and have indicated some factual finding as to the validity of the alien's waiver. Its clear, however, that it was not done in this case and it would be an invalid deportation before the administrative courts. Because this is so, it cannot be said it is a valid deportation for purposes of a criminal proceeding.

B. Even If the IJ Order Indicated There Was a Valid Waiver, the Undisputed Factual Evidence Presented by Mr. cesareo Demonstrates That the Stipulation Was Note Entered into Knowingly, Intelligently, and Voluntarily.

Mr. Cesareo submits to the Court that he in fact did not enter the stipulation knowingly, intelligently, and voluntarily. Mr. Cesareo submitted facts, which indicate that he was placed in an overcrowded facility where on September 22, 2005, approximately 950 detainees were peacefully protesting the delays in the immigration court. (Defense Exhibit G). The protest attracted media coverage and TV helicopters hovered over the facility. *Id.* The very same day of the protest and the media coverage – September 22, 2005 – immigration officials had more than one hundred individuals sign waivers, including Mr. Cesareo. (Defense Exhibit F, G). Mr. Cesareo was young, lacked education, was uncounseled, and unrepresented. Although it was clearly a chaotic day for immigration officials and the detainees, the unsophisticated Mr. Cesareo was asked to signed a stipulation he did not understand in this mass deportation setting.

Although the government does not dispute these facts and provides no evidence to the contrary, it asks this Court to find such a setting to comply with the norms of due process, such that the government should be able to continue to criminally prosecute Mr. Cesareo. The Supreme Court has made it unequivocally clear that criminal sanctions cannot be based on a deportation that violated the alien's due process rights. *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987).

Because Mr. Cesareo's deportation lacks any indicia of due process, it cannot be the basis of a criminal prosecution.

C. The Government Incorrectly Relies on the Wrong Subsections of 1229c. Mr. Cesareo Was Eligible for Fast Track Voluntary Departure under 8 U.S.C. 1229c(a).

Mr. Cesareo's case falls on all fours with *Ortiz-Lopez*, which held that due process rights are violated when the individual was not informed that "he was eligible for fast track voluntary departure in lieu of removal, under ***8 U.S.C. 1229c(a)***. Accordingly, [the defendant] will have met all the requires for a successful collateral attack on his Section 1326 conviction – provided he can show that he could in fact have received voluntary departure under 1229c(a) at the time of his removal hearing." *Ortiz-Lopez*, 385 F.3d at 1203 (emphasis added). Section 1229c(a) allows for voluntary departure except for aliens who (1) are involved in terrorism related activity or (2) have been convicted of an aggravated felony. 8 U.S.C. 1229c(a) (attached hereto as Exhibit K). Because Mr. Cesareo can show that he was eligible for voluntary departure under 1229c(a), under *Ortiz-Lopez*, he has met the requirements of collateral attack under section 1326(d).

The government's response, however, completely ignores 1229c(a) and instead directs the Court's attention to different subsections – i.e. 1229c(b) and (c) – not relevant to Mr. Cesareo's argument. GR at 10. Mr. Cesareo chooses not to address those subsections since they are not relevant to his eligibility for section 1229c(a).

CONCLUSION

Because Mr. Cesareo has demonstrated that his due process rights were violated during the administrative process and he was prejudiced by the violation, Mr. Cesareo requests that this Court grant his motions.

Respectfully submitted,

//s// Zandra L. Lopez

Dated: June 13, 2008

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